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No. 239.

Brf. of Atty. Gen. (Pradt) for Appellee

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In the Supreme Court of the United States.

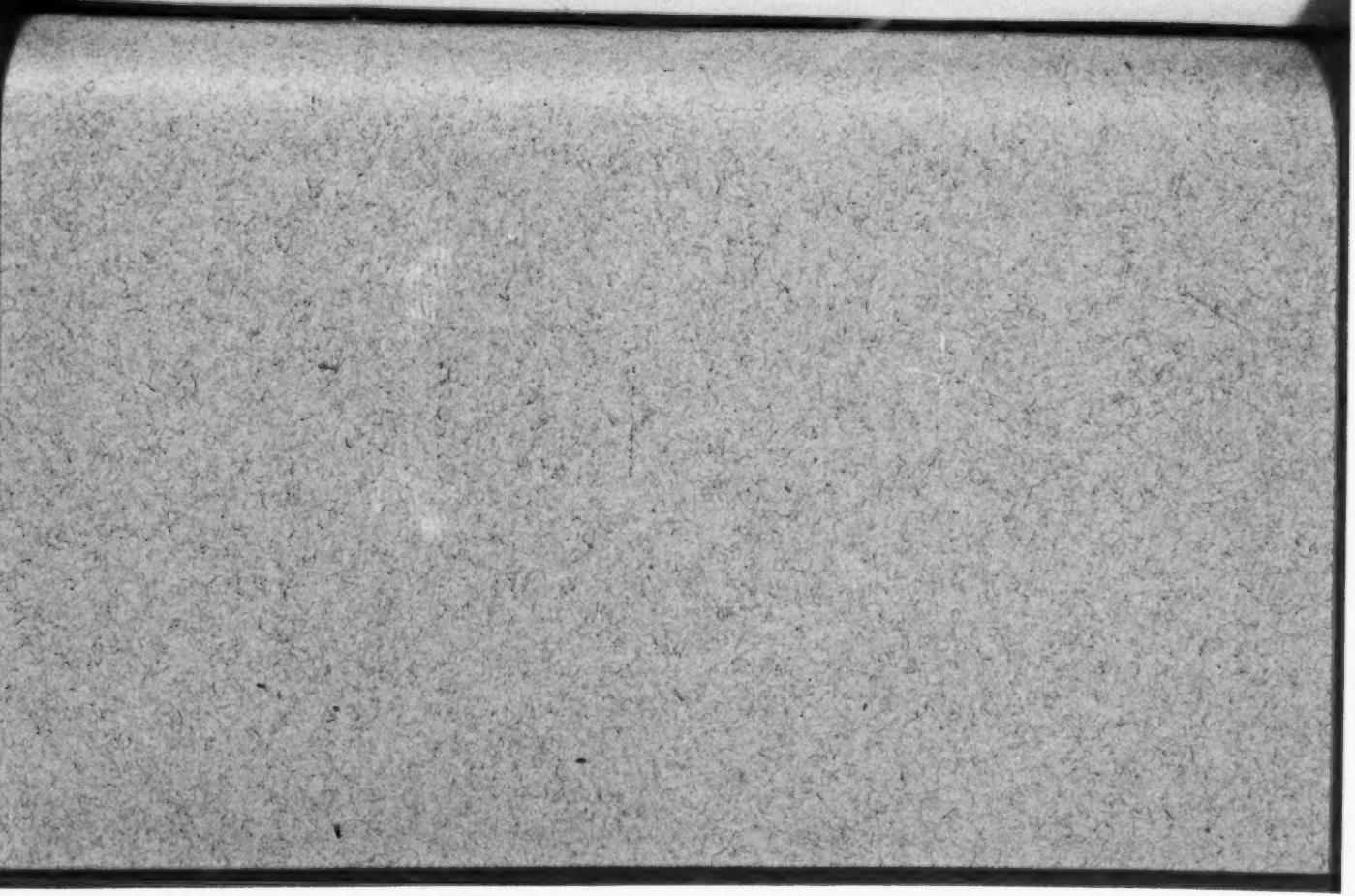
WILLIAM R. REAGAN, APPELLANT,
v.
THE UNITED STATES. } No. 239.

OCTOBER TERM, 1900.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

L. A. PRADT,
Assistant Attorney-General.



In the Supreme Court of the United States.

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WILLIAM R. REAGAN, APPELLANT,
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BRIEF FOR THE UNITED STATES.

The appellant was originally appointed a United States commissioner by the United States court for the Indian Territory, under the provisions of section 39 of the act of Congress approved May 2, 1890, chapter 182 (1 Suppl. R. S., 737), as set forth in appellant's statement. Subsequent thereto the act of Congress approved March 1, 1895, chapter 145 (2 Suppl. R. S., 392), was passed and the appellant was reappointed to the same office under the provisions of said act. By an order of the judge of the district where the appellant resided, entered January 31, 1896, the appellant was removed from office without notice of any charge against him and without hearing or opportunity to submit proof in his defense.

Section 4 of said act of March 1, 1895 (2 Suppl. R. S., 394), provides for the appointment of commissioners, as follows:

> That each judge of said court shall have the powers conferred by law upon the United States circuit courts to appoint commissioners within the district in which he presides, who, at the time of their appointment, shall be duly enrolled attorneys of some court of record of the United States or of some State, and shall be competent and of good standing, and shall be known as United States commissioners, but not exceeding six commissioners shall be appointed for any district hereinbefore constituted:

Said section then proceeds with the following proviso:

> *Provided*, That the present commissioners shall be included in that number and shall hold office under their existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law.

The contention in this action arises upon the interpretation to be given to the foregoing proviso, the position of the appellees being that as no cause for the removal of a United States commissioner or a circuit court commissioner was "prescribed by law," that part of said proviso relating to removal is nugatory.

No cause for the removal of a commissioner in Indian Territory or a circuit court commissioner has ever been prescribed by any United States statute. The proviso of section 4 before quoted comprises all the legislation upon that subject. And so the law remains to-day, for

Congress has never seen fit to further legislate upon this matter.

In the absence of constitutional provision or statutory regulation the power of removal is incident to the power of appointment. (*Ex parte Hennan*, 13 Peters, 230, 258; *Parson's Case*, 167 U. S., 324; *United States* v. *Alred*, 155 U. S., 594.) This rule the appellant admits. No Constitutional provision exists. Under article 2, section 2, of the Constitution, Congress has vested the appointment of commissioners in the courts of law. Does the proviso of section 4 constitute a statutory regulation?

CONGRESS REFERRED TO EXISTING CAUSES OF REMOVAL.

When Congress provided for the removal of "the (then) present commissioners" "for causes prescribed by law," it had in contemplation causes which had been prescribed and were in existence at the time of the enactment of the statute. The past participle "prescribed" refers to past action—to action that had been already completed. In its ordinary sense it means something written before, something laid down beforehand, as a rule of action or a method of procedure. This is its natural meaning, and is the sense in which it is used in the vast majority of statutes wherein such a phrase as the one here or a like phrase is used. Legislatures are constantly enacting statutes providing that the procedure under them shall be "in the manner provided by law," "as prescribed by law," and phrases of like import, referring the execution of the statute to a system of procedure already made and provided by legis-

lative action. And there is nothing in the proviso to section 4 to indicate that any meaning other than the ordinary one is there intended. The apparent object of the proviso was to include "the (then) present commissioners" under the new appointments, and, in order to enforce such object, referred them to a protection which Congress supposed to be in existence at the time, but which in fact was not.

Section 3 of the act of March 3, 1825 (4 U. S. Stat., 115) provides that any offense committed in certain places the sites whereof are ceded to the United States, the punishment for which was not specially provided for by any law of the United States, shall, upon conviction, be liable to and receive the same punishment as the laws of the State wherein such place is situated "provide for the like offense when committed within the body of any county of such State."

In *United States* v. *Paul* (6 Peters, 141) the defendant was indicted, in 1830, under said statute for breaking and entering a store at West Point within the sole and exclusive jurisdiction of the United States. The store was not in any way identified with a dwelling, and the offense, therefore, was not burglary at common law, nor by the laws of New York as existing in 1825, but was created a burglary in the third degree by the Revised Statutes of New York going into operation in 1829. The defendant moved to quash said indictment upon the ground that the third section of said act is to be limited to the laws of the several States in force at the time of its enactment. The case came up to this court on a certificate of division from the circuit court.

Chief Justice Marshall stated the opinion of this court to be that the third section of the act of March 3, 1825, is to be limited to the laws of the several States in force at the time of its enactment.

The principle in said case is approved by this court in *Waring* v. *Clarke* (5 How., 476).

To sustain appellant's contention that "prescribed" should be read "*to be* prescribed," and that, therefore, the removal of a hold-over commissioner in Indian Territory must await legislative action, is to say that Congress provided a particular class of officers for the Indian Territory, the members of which generally should be removable at the will of the power appointing them, for section 4 leaves all the commissioners (except the hold-over commissioners) in that situation, and that it then by the proviso selected out of that class certain members thereof who should hold office during good behavior, i. e., during life, or at least until Congress at some future time should state causes subjecting them to removal, a thing Congress might or might not do, and which it has not yet done.

The language of the act does not authorize such a constrained and unnatural construction. Had Congress intended such commissioners to hold office during good behavior, it would have declared so clearly. If it had intended to relegate the matter of removal to some future time, indefinite and uncertain, it would have done so in language framed to leave no doubt of such intention. It would have used language importing futurity, as in the California constitution hereinafter referred to. And in the absence of such intention

clearly and unequivocally expressed, it is an unwarrantable and unreasonable construction to ask a court to say that Congress had intended to so legislate in derogation of the ordinary rights of the judiciary and in violation of all legislative precedent. Especially is this true where the language of the act has a clear, plain meaning, offering so little for construction as section 4 of the act of 1895.

In *Lyman* v. *Grammercy Club* (50 N. Y. S, 1004), the supreme court of New York lays down this doctrine in the following language:

> There is a presumption against an intention on the part of the legislature to infringe upon the province of the judicial department of the Government, and to devest the court of any of its essential powers, or to forbid the exercise of such powers in particular cases; and any construction leading to such a result must be avoided if possible. Such an intention must be expressed in clear and unequivocal terms. There must be express negative words, or the implication must be necessary and irresistible. It is supposed that the legislature would not make so important an innovation without a very explicit expression of its intention.

TO PRESCRIBE LOOKS TO LEGISLATIVE ACTION, NOT TO JUDICIAL INTERPRETATION.

To prescribe, in the sense here used, is to proclaim the legislative will. It is a lawmaking power and belongs to the legislature. It may be delegated in a degree as to courts to prescribe rules of court, and even then is not judicial, but administrative. But it is no

part of the judicial power to prescribe laws, rules of action, or causes which may become the bases of claims of right or exemption on behalf of parties. The duty of the judiciary is to decide upon rights under the rules laid down by the lawmaking power.

The words "prescribed by law" look to legislative action and not to judicial interpretation. Such has been the holding of courts in this country where the question has been presented to them.

The constitution of California (art. 1, sec. 3) provides:

> The right of trial by jury shall be secured to all, and remain inviolate forever, but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law.

In the case of *Exline* v. *Smith* (5 Cal., 112) the court in interpreting this provision say (Murray, C. J.):

> The words "prescribed by law" used in the constitution look to actual legislation upon the subject, and in no just sense can be construed into a permission for the exercise of this power by others. * * * Besides, the power to "prescribe by law" is legislative, and can not be conferred on judicial officers.

The same principle is maintained in *Burgoyne* v. *Supervisors* (5 Cal., 9). See also *Sloan* v. *Gibson* (4 Mo., 32).

The constitution of Missouri (art. 6, sec. 27), in establishing the circuit court of St. Louis County, provides:

> The judges of said circuit court may sit in general term for the purpose of making rules

> of court, and for the transaction of such other business as may be provided by law.

This section was interpreted by the court in the case of the *State ex rel. Lionberger* v. *Tolle* (71 Mo., 647), the syllabus of which is:

> The power given to the judges of that court in section 27 to transact "such other business as may be provided by law," includes the performance of such duties pertaining to judicial business as the legislature may deem it necessary for the judges to perform with a view to the efficient administration of justice or the protection of the rights of litigants and others who are to be affected by legal proceedings.

The court (Hough, J.) say:

> The power to make rules of court conferred by the twenty-seventh section of the constitution above cited is itself not strictly a judicial power. Acts done by courts under rules established by themselves are of course judicial in their nature; but to prescribe a rule of action properly belongs to the law-making power. To decide upon the rights of parties under a rule prescribed belongs to the judicial power.

CONGRESS DID NOT REFER CAUSES OF REMOVAL TO ARKANSAS STATUTES.

In his brief the appellant enumerates such of the chapters of the laws of the State of Arkansas contained in Mansfield's Digest and put in force in the Indian Territory as he considers to be pertinent to the issue in this case, but I can not find that chapters 64 and 129 mentioned in said brief were ever so put in force.

The effect of these provisions, according to appellant's contention, is to make a "(then) present commissioner" in Indian Territory the equivalent of a justice of the peace in Arkansas; that when the removal of such commissioner is forbidden, except for "causes prescribed by law," and no Federal statute prescribes specific causes for removal, we must look to the laws of Arkansas prescribing causes for the removal of a justice of the peace, and that if a cause is found against such commissioner in Indian Territory, which by the laws of Arkansas would have been a cause for the removal of a justice of the peace, he may then be removed; otherwise, protected by this proviso, he is not subject to removal by the courts of the United States.

The practical effect of appellant's construction would be that one of "the (then) present commissioners" in Indian Territory could be removed only for conduct which would be a cause for impeachment of the judges of the highest courts of the United States, or he would hold office during good behavior; in other words, for life. Such commissioner once appointed would have it in his power to remain in office for life. No cause, however good and sufficient in itself, could affect him, unless it was specified in those laws of Arkansas made applicable to Indian Territory.

That such an interpretation can not be put upon this proviso seems to have been settled by this court. A commissioner is one of those inferior officers whose appointment is vested by Congress in the courts of law under Article II, section 2, of the Constitution, and he

or the like officer in all other jurisdictions of the United States, has always been considered in the same light as a master in chancery and a register in bankruptcy (*United States* v. *Alred*, 155 U. S., 591.)

In *Ex parte Hennan* (13 Peters, 230), the court say (p. 258):

> All offices, the tenure of which is not fixed by the Constitution, or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the Government and subject to removal at pleasure. It can not for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.

In the recent case of *Parsons* v. *U. S.* (167 U. S., 324) this court affirmed said principle, and held it to be the right of the President to remove an officer at his discretion although the term of office may have been limited by the words of the statute creating the office. The cases of *McAllister* v. *U. S.* (141 U. S., 174) and *Keim* v. *U. S.* (177 U. S., 290) also sustain the principle of removal at will by the appointing power.

While the statute confers upon commissioners in Indian Territory the powers of justices of the peace and provides that the practice and procedure before them shall be that of Arkansas, it nowhere prescribes that they or "the (then) present commissioners" shall be removed for causes which the Arkansas law provides in the cases of justices of the peace in that State. It is true that some of the Arkansas criminal laws made applicable to Indian Territory, as a consequence of conviction of certain public offenses, add the cumulative penalty of removal or exclusion from office. (Chap. 45, secs. 1911, 2324, 2325, Mansfield's Digest.) It is also true that a justice of the peace is removable for other causes defined by other laws of Arkansas, which other laws were not made applicable to and are not laws of the Indian Territory. (Chap. 64, sec. 3306; chap. 129, sec. 5874, Mansfield's Digest.) It seems an unreasonable construction that Congress intended that such an inferior officer should be removed for crime only or should hold office for life, and omitted to include other causes applicable to the officer whose tenure appellant considers as controlling. Especially is this true when we consider that commissioners are regarded by the United States courts in the same light as masters in chancery and registers in bankruptcy. If Congress had so intended, and had intended to curtail and limit the judicial power in such a great degree, it would certainly have indicated such intention by enumerating such causes in the act of 1895, or by some other method equally clear and unambiguous.

That such was not the intention of Congress seems to me to be apparent when we examine the tenure of office of a United States commissioner and that of an Arkansas justice of the peace. A justice of the peace in Arkansas is elected by the people and his tenure of office is fixed at two years. These provisions are in both the Arkansas constitution and statutes. He comes strictly within the rule that where an officer is elected or appointed for a fixed term he can not be removed without notice and hearing. By the act of 1895 the judges of the United States court for Indian Territory are vested with the powers conferred upon United States circuit courts to appoint commissioners. Such commissioners hold office at the pleasure of the court only. Congress could not have intended to engraft upon the general law governing such appointments an exception in favor of a few Indian Territory officers then holding appointments, so restrictive of the power of removal as appellant contends for.

NO CAUSE OF REMOVAL BEING PRESCRIBED, THE STATUTE IN THAT REGARD IS INOPERATIVE.

If possible, every word in a statute should have a meaning and be given effect. Yet this rule is limited by another—that a court can not supply a meaning to a defective statute or where there is an omission. The meaning must be derived from the statute itself, and if there has been an omission it is for the legislative body to correct such defect or supply such omission by enactment, not for the court to legislate. Such seems

to be the case with section 4 of the act of 1895. No cause of removal for a commissioner had been prescribed by law, none was prescribed by the statute itself, and there never has been a statutory regulation as contemplated in *Hennan's Case* (13 Peters, 230).

Woodbury & Co. v. *Berry* (18 Ohio St., 456) was on motion to amerce the sheriff of Marion county for failure to levy and return within sixty days an execution issued from the common pleas court of said Marion County. The statute provided generally that any sheriff or other officer guilty of any of the delinquencies enumerated therein may be amerced on motion and "two days notice thereof in writing" (sec. 451), and then, by section 455, provided for an exceptional case, that in the case of "a sheriff or other officer of any county from which the execution issued" such notice should be at least fifteen days.

The court say (Brinkerhoff, J.), page 461:

> "Now, it certainly is difficult, if not impossible, to find any reason why an officer sought to be amerced by motion in the court of his own county should be thus favored in the matter of notice, while, on the other hand, the circumstances of the case to be provided for seem to require that the nonresident officer ought to be thus favored. These considerations, and a comparison of the provisions of these sections of the statute as they stand with those of the statute which was superseded and repealed by the code of civil procedure, not only suggest the conjecture, but convince us of the fact that

> the words *other than the county*, or some equivalent phrase, must have been by accident or oversight of the draftsman of the bill to establish a code of civil procedure, or of the clerk who engrossed it, omitted before the words "from which the execution issued," in section 455. But notwithstanding all this, *ita lex scripta est.* The language as it stands is clear, explicit, and unequivocal. It leaves no room for interpretation, for nothing employed in the language is doubtful. We are satisfied by considerations outside of the language that the legislature intended to enact something very different from what it did enact. But it did not carry out its intention, and we can not take the will for the deed. It is our legitimate function to interpret legislation, but not to supply its omissions.

The appellant does not stand in the defensive position of holding the office until a cause of removal shall be prescribed by law, but the statute in that regard is inoperative, and is deemed to have the force it would have possessed if no limitation had been attempted.

This principle finds a clear exposition in Chaffee's appeal, 56 Mich., 244.

This was a proceeding taken under a statute authorizing the opening, extending, widening, or straightening of streets and alleys in the city of Detroit, and the condemnation of land therefor according to the procedure therein prescribed. The case, as held by the court, was for the purpose of widening an avenue in said city. There was no procedure therein prescribed for widening streets and condemning land therefor.

The court held the statute to that extent to be inoperative. Paragraph 3 of the syllabus of the case is:

> An act which authorizes a municipal body to open and widen streets according to the procedure therein prescribed and then prescribes no procedure for cases of widening streets is to that extent inoperative.

Sherwood, J., in delivering the opinion of the court, says (p. 250):

> I do not find in any section of the act (and there alone it exists if at all) any provision for the assessment or payment of damages and compensation for land taken to widen or straighten a street or alley in the city of Detroit. It is true the oath to be administered to the jury under section 11 requires them to make assessment of one-half the amount awarded against property in the assessment district as established by the council; but they can make such assessment only in cases where the other provisions of the act authorize them to do it, and such authority should be express, and not left to doubtful implication. The first section of the act delegates the power to the city to take private property for the purpose of widening a street and to take proceedings for that purpose provided in the act; but through some oversight the necessary proceedings for that purpose do not seem to have been provided. The right, therefore, to take property to widen a street is not available.
>
> (Page 252): In a statute authorizing these proceedings, or in the proceedings themselves,

> nothing should be left in doubt or uncertainty as to their character or object, or in the means provided for the accomplishment of the object.

In *Baker* v. *Potter* (55 Nebraska, 25) the court hold:

> Where there was an abortive attempt by subsequent legislation to limit the operation of an existing statute, such statute must be deemed to have the force it would have possessed if no limitation of it had been attempted.

This case expresses the doctrine laid down by the text writers and adjudicated cases.

See Dwarris on Stat., page 215; Story, Confl. Laws, 17; Bishop on Written Laws, section 146, and cases cited.

If the words "prescribed by law" in this section are nugatory, the statute is left to read in effect "for cause," without any specification of the causes of removal. The settled rule in this country, as stated in Throop on Public Officers, section 396, is that where the statute gives a power of removal "for cause" without any specification of the causes this power is of a discretionary and judicial nature, and unless the statute otherwise specially provides, the exercise thereof can not be reviewed by any other tribunal with respect either to the cause, or to its sufficiency or existence or otherwise. Even in some cases where the statute specifies the cause of removal, it has been ruled that the removing authority is the sole and exclusive judge of the cause and the sufficiency thereof, and that the courts can not review its decision in any case where it had jurisdiction. (*People ex rel.* v. *Stout*, 11 Abb. Pr.

(N. Y.), 17; S. C., 19 How. Pr. (N. Y.), 171; *People* v. *Bearfield*, 35 Barb., 254; *Patton* v. *Vaughan*, 39 Ark., 211; *People* v. *Hill*, 7 Cal., 97; *City of Hoboken* v. *Gear*, 25 N. J. L., 265; *Smith* v. *Brown*, 59 Cal., 672; *People ex rel.* v. *Higgins*, 15 Ill., 110.)

As no cause of removal is prescribed, and the power of removal is of a discretionary and judicial nature, not subject to review, the letter placed upon record in the United States court by Judge Kilgore was superfluous, as is also the statement of any reason for the removal of the appellant.

NOTICE AND HEARING.

It is not disputed that the American rule is that where causes for removal of an officer are specified in a constitution or by statute, or the term of office is for a fixed period, the officer can not be removed unless notice be given him and he be afforded a hearing. But appellant has made out no such case. And until he has done so the Court of Claims is not subject to his criticism for not giving weight to doctrines which do not obtain in the case at bar. The authorities cited by appellant only sustain the undisputed American rule, where they are applicable at all. They are as follows:

In *Page* v. *Hardin* (8 B. Mon. (Ky.), 648) the governor summarily removed the secretary of the Commonwealth. The constitution of Kentucky (2d Constitution, Art. III, sec. 2) provide that the governor shall be elected for the term of four years. And Article III, section 24, provide that "a secretary shall be

appointed and commissioned during the term for which the governor shall have been elected, if he shall so long behave himself well."

In the language of the decision quoted by the appellant the court say:

> The law, too, prescribes the duties and tenure of the office, and thus furnishes a rule for the decision of the question involved.

In *Dullam* v. *Willson* (53 Mich., 392) the respondent was appointed a trustee of the Michigan Institution for Educating the Deaf and Dumb and the Blind for a term of six years. And the constitution of Michigan provided that the governor could remove for the specific causes mentioned therein only, and upon charges specifying the particular acts or neglect.

In *Commonwealth* v. *Slifer* (25 Pa. St., 23) the adjutant-general of the State militia was summarily removed. He had been commissioned as such officer for a term of three years.

In *State* v. *St. Louis* (90 Mo., 19) a police justice of the city of St. Louis had been removed. His term of office was fixed at four years.

In *Meade* v. *Deputy Marshal* (1 Brock., 324) the petitioner was taken and held in custody for nonpayment of a fine assessed against him by the sentence of a court-martial without notice or hearing. The court held such a sentence to be void, and that under the laws of Virginia the assessment of a fine or trial of a militiaman not in actual service is performed by a court of inquiry, and a second court of inquiry must sit to re-

ceive excuses before the sentence becomes final or can be executed.

It might be a sufficient answer to the English cases cited by appellant to recall to the court that removal at the will of the appointing power is a doctrine that has grown up in American courts, that at common law it did not exist (Throop, Pub. Officers, sec. 362), and that the tenure of office in England is generally held by prescription or other fixed tenure. Yet, tested by the American rule, they will be found to specify causes for removal.

In *Queen* v. *Archbishop of Canterbury* (1 El. & El., 545) the statute (sec. 98 of 1 and 2 Vict., c. 106) enacts "that the bishop shall have power, after having given to the curate sufficient opportunity of showing reason to the contrary," to revoke summarily his license.

The statute also provided for an appeal by the curate to the archbishop. Upon such appeal the archbishop confirmed the revocation of a curate's license without affording him a hearing. Such action of the archbishop was held erroneous, as it well might be, for upon appeal the curate should have been afforded "sufficient opportunity of showing reason to the contrary."

In *Capel* v. *Child* (2 Cromp & Jerv., 558) the statute (57 Geo. III, sec. 50) provided that whenever it shall appear to the satisfaction of any bishop, either of his own knowledge or upon proof by affidavit laid before him, that by reason of the number of churches or chapels in a benefice, the distance of such churches or

chapels, the distance of residence of the spiritual person serving the same, or by his negligence the ecclesiastical duties of such benefice are inadequately performed, the bishop may require the spiritual person serving the same to nominate a curate, and if such person did not, the bishop himself could do so.

This statute prescribes specific causes, and the bishop having nominated without having afforded a hearing upon such causes upon proof of his own knowledge or by affidavit, was held to have acted erroneously.

Williams v. *Bagot* (3 B. & C., 781) was an action of debt where personal service of summons was required. Summons was not served personally upon the defendant, but was left at his place of residence. Judgment was rendered by default against him. The recorder certified up that it was the ancient custom to serve by leaving at the place of residence, but on error judgment was set aside and the custom held to be bad.

OTHER DEFENSES.

Appellant can not recover on principle, but even if he had been removed illegally, his own conduct has precluded him from here claiming for his salary in this action.

Appellant was removed January 31, 1896, by the order of the court (Finding of Fact II). Thereafter he protested that said letter (or order) was insufficient to remove him and served such protest on the judge of the court (Finding III). The petition in this action was filed October 13, 1897, and was amended October 29, 1899. Appellant took no other or further action

to assert his claim to said office or to obtain a reversal of the action of the judge until the institution of this proceeding (Finding VIII). The salary of said office was $1,500 per annum (2d. Suppl. R. S., chap. 145, sec. 4, p. 395). The successors of appellant exercised said office and were paid the salary thereof (Finding IX). Appellant's successors were paid the salary of said office by the disbursing clerk of the Department of Justice, in the absence of any notice or claim on the part of appellant (Finding X).

Viewed in the aspect most favorable to claimant, those who succeeded him to said office were *de facto* officers, at least. They were in possession of the office and exercised its functions under color of appointment by the only body having power to appoint. From February 3, 1896, until October 13, 1897, the commencement of this action, a period of one year and eight months, the appellant permitted the disbursing officer of the Department of Justice to pay to his successors the salary now claimed to be due to him, without other notice, action, or claim than that made to the judge that the order of removal was insufficient to effect such removal.

It seems to be well settled that, in the absence of notice, claim or demand, payment of the salary of an office by a public body to a *de facto* officer is a complete defense to an action by a *de jure* officer for such salary, and that a disbursing officer has the right to rely upon the apparent title of an officer *de facto* and discharge himself and the public body for which he

acts by payment to such officer of the salary or other emoluments of the office.

Smith v. *Mayor*, 37 N. Y., 518; *Terhune* v. *Mayor*, 88 N. Y., 249; *Dolan* v. *Mayor*, 68 N. Y., 274; *McVeany* v. *Mayor*, 80 N. Y., 185; *Auditors, &c.*, v. *Benoit*, 20 Mich., 176; *Scott* v. *Crump*, 106 Mich., 288; *McDonald* v. *Newark*, 58 N. J. L., 12; *State* v. *Milne*, 36 Nebr., 301; *Steubenville* v. *Culp*, 38 Ohio St., 18; *Demarest* v. *Mayor*, 74 Hun., 517; *State* v. *Auditor*, 52 Mo., 518; *Lee* v. *Wilmington*, 1 Marvel (Del.), 65.

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